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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Estate of PATRICIA GOODWIN, Deceased.	
GERALD LEE FARRELL, Petitioner and Appellant, v. ELIZABETH SMITH, Objector and Respondent.	A152146 (San Mateo County Super. Ct. No. PRO126458)

MEMORANDUM OPINION[1]

Gerald Lee Farrell, currently the special administrator of the estate of Patricia Goodwin, appeals from an order of the probate court granting the motion of Elizabeth Smith to vacate various prior orders. These vacated orders include a prior order striking Smith's objection to Farrell's petition to commence probate and for appointment as administrator. We affirm the order vacating the prior orders.

Background

Goodwin died in October 2015 without having married and without having had children. Several months later, Farrell, one of Goodwin's nephews, filed a petition to administer Goodwin's estate under the Independent Administration of Estates Act, for

[1] We decide this appeal by memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1(1) and (3).

appointment as administrator, and for issuance of letters of administration. Several weeks thereafter, Smith, one of Goodwin's nieces, objected to the petition on the ground Goodwin had not died intestate, but had executed a revocable trust and pour over will.

Farrell responded with a petition to invalidate the purported trust and will on multiple grounds, including lack of testamentary capacity and undue influence. Smith filed a verified response, which included her own declaration and one by the attorney who had prepared the trust and will. Among other things, Smith and the attorney averred Goodwin had expressly stated she wanted none of her nephews and nieces, except Smith, to share in her estate.

Smith's own attorney, Steven Strain, although having prepared and filed Smith's response to Farrell's petition to invalidate the trust and pour over will, thereafter failed to respond to Farrell's discovery requests, failed to appear at a July 8, 2016, hearing on Farrell's motion to compel, and failed to respond to the court's July 8 written order compelling responses to the discovery and awarding monetary sanctions. Strain also failed to apprise Smith of any of these developments.

Having heard nothing from Strain, Farrell, on September 15, 2016, moved for "terminating" sanctions or a further order compelling discovery responses and awarding additional monetary sanctions. Strain again filed no opposition and did not appear on the motion; he also did not tell Smith of these developments.

At a hearing on October 17, 2016, the probate court granted Farrell's motion for terminating or other sanctions and directed that a formal order be submitted for signature. On November 3, the court signed, and on November 4, filed, a formal written order that (a) granted Farrell's "motion for terminating or other sanction," (b) struck Smith's objection to Farrell's petition for probate, for appointment as administrator, and for issuance of letters, and (c) granted Farrell's petition.

Four months later, Smith, represented by a new attorney, David Rosenbaum, filed a motion to vacate the "Order Imposing Sanctions" "entered" on July 8, 2016 and the "Order Striking Opposition" "entered" on October 17, 2016. In her supporting declaration, Smith averred that after April 26, 2016, she repeatedly tried to contact Strain

about the status of the case but received no response. Strain finally returned her calls on October 4, but only told her the case was " 'still in the fact-finding stage.' " Smith asserted she knew nothing about the July 8 motion to compel, the order compelling responses, the subsequent motion for terminating or other sanctions, or the November 4 order striking her objection and granting Farrell's petition until January 19, 2017, when she saw a notice to vacate, issued by Farrell as administrator, posted on the door of Goodwin's former residence. Smith's new attorney also submitted a supporting declaration, attaching a State Bar complaint alleging misfeasance by Strain in another probate case.

Farrell opposed Smith's motion to vacate on numerous grounds, including: (1) Smith had not yet filed a substitution of counsel; (2) she could not seek relief under Code of Civil Procedure section 473, subdivision (b) on grounds of attorney neglect because she had not filed an affidavit by Strain professing error; (3) she could not seek relief under Code of Civil Procedure section 473, subdivision (b) on grounds of inadvertence, surprise or excusable neglect as to the July 8, 2016 order compelling responses, as more than six months had passed, nor could she show "excusable neglect"; and (4) Smith, herself, was derelict in following up with Strain. Farrell also construed Smith's motion as seeking relief only as to the court's discovery rulings and claimed these rulings were now moot, since the court had granted his petition for probate and appointment as administrator.

In reply, Smith acknowledged that to the extent she sought to vacate the initial order compelling discovery, her motion to vacate was filed six months and 12 days after the court, on August 12, 2016, signed and filed a formal written order.[2] She urged the court to nevertheless vacate that order on equitable grounds. As for the order striking her objection and granting Farrell's petition for probate and appointment as administrator, her motion was filed well within the statutory six-month period. She additionally

[2] Apparently, the probate court inadvertently signed and filed two written orders compelling responses to Farrell's request for production, one on July 8, 2016 (the date of the hearing) and one on August 12.

acknowledged she had not provided an attorney's affidavit of fault, but explained she could not do so because Strain had died. She further asserted she was entitled to relief in any event because Strain's neglect was so extreme as to amount to positive misconduct. She also disputed Farrell's accusations that she had, herself, been neglectful in following up with Strain and staying abreast of the case. And finally, she maintained the court's striking of her objection to Farrell's petition was, in effect, a default judgment and therefore within the ambit of Code of Civil Procedure section 473, subdivision (b).

Smith's motion to vacate came on for hearing on March 29, 2017, as Farrell contested the court's tentative ruling to grant the motion. His counsel maintained the court had no jurisdiction to vacate the order compelling discovery responses because more than six months had elapsed before Smith moved to vacate, and that the subsequent order striking Smith's objection was "moot" because the court had granted Farrell's petition for probate and appointment as administrator. The court, expressing concern that Strain's derelictions had deprived Smith of her constitutional rights of access to the court and due process, asked for additional briefing and continued the motion for further hearing.[3]

Smith subsequently filed an "amendment to notice" of the motion to vacate, adding specific reference to the fact the court had not only struck her objection to Farrell's petition, but also had granted his petition for probate and appointment as administrator. She also submitted a supplemental memorandum, responding to the court access and due process issues the probate court had raised at the hearing. Smith reported the death certificate for Strain identified as the causes of death renal failure, liver failure and cholangiocarcinoma, from which he had been suffering for months. While Smith had also subpoenaed Strain's medical records, she had not yet received them.

[3] The court also denied a request by Smith that Farrell's powers (and the eviction of the tenants residing in Goodwin's former residence) be stayed pending decision on the motion to vacate. The court refused to interfere "absent clear indication that that's appropriate."

Farrell also filed an additional memorandum. He first objected that Smith had improperly enlarged her motion by expressly referring to the court's granting of his petition for probate and appointment as administrator. He additionally objected that Smith had made representations about Strain's condition and misconduct that were not supported by competent evidence. He further maintained the order granting his petition for probate and appointment as administrator was a final, appealable order that had not been appealed and therefore the order was "final" and could not be "collaterally" attacked by way of a motion to vacate.

At the outset of the continued hearing, the probate court asked Farrell's attorney if Farrell "really wanted" a continuance in light of Farrell's objection to Smith's "amended" notice of motion. Counsel declined the offer. Counsel then asserted the court's order striking Smith's objection and granting Farrell's petition for probate and appointment as administrator was not a "default" judgment that could be vacated under Code of Civil Procedure section 473, but rather was an appealable order that could be challenged only on appeal but no appeal had been taken. While the court agreed its prior order was not a "default" judgment per se, it was, said the court, "akin" to a default judgment. (Cf., *Greenup v. Rodman* (1986) 42 Cal.3d 822, 827–828 [order striking answer as a discovery sanction resulted in default judgment and was subject to limits on amount for which judgment could be entered].)

After hearing from both counsel, the probate court adhered to its tentative ruling and, on "fundamental fairness" grounds, granted Smith's motion to vacate the challenged discovery order and the order granting "terminating" sanctions and granting Farrell's petition for probate, for appointment as administrator and for issuance of letters.

Discussion

Farrell's appeal is limited to a single issue. He maintains, as he did in the probate court, that the order striking Smith's objection and granting his petition for probate and appointment as administrator was appealable, and that, having become final by virtue of not being appealed, the order cannot now be "collaterally" attacked by way of a motion to vacate either under Code of Civil Procedure section 473 or as a matter of equity.

Thus, in his opening brief, while Farrell acknowledges an order granting a motion to vacate is ordinarily reviewed on appeal only for abuse of discretion, he maintains that, having raised only a legal issue pertaining to the "jurisdictional power of the probate court to act," the proper standard of review in the instant appeal is de novo.

Farrell is correct that numerous probate court orders, including an order admitting a will into probate, or an order granting a petition for appointment as administrator, are, by statute, appealable. (Prob. Code, § 1303, subds. (a), (b); see *Estate of Williams* (2007) 155 Cal.App.4th 197, 202 & fn. 3, 214, fn. 4). He is also correct that, like any appealable judgment or order, an appealable probate order that is not challenged on appeal attains preclusive effect. (See *Estate of Beard* (1999) 71 Cal.App.4th 753, 774; *Estate of Muller* (1969) 2 Cal.App.3d 259, 274.)[4]

Neither of these principles, however, precludes a probate court from hearing and granting a motion to vacate under Code of Civil Procedure section 473, or based on extrinsic fraud. (See *Estate of Sanders* (1985) 40 Cal.3d 607, 613–614 ["Even in the absence of a timely contest, however, a court may exercise its equitable jurisdiction to set aside orders and decrees of probate proceedings in cases of fraud or mistake."]; *Estate of Carter* (2003) 111 Cal.App.4th 1139, 1154 [probate court had inherent equitable authority to set aside an order for final distribution on ground of extrinsic fraud]; cf. *Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 574–579 [not questioning probate court's jurisdiction to hear and rule on statutory motion to vacate made after time to appeal had run and holding that while *denial* of a motion on statutory grounds was not *appealable* under the probate code, to extent statutory motion was denied on equitable grounds, it was appealable under the circumstances of the case, and reversing denial of motion].)

While Farrell suggests the probate court did not grant Smith's motion on the ground of extrinsic fraud or mistake and pursuant to its inherent equitable power, certainly this was the thrust of the court's order granting Smith's motion to vacate on

[4] Because this proposition is beyond cavil, we need not, and do not address, the numerous authorities Farrell has cited in support of it.

grounds of "fundamental fairness." (See *In re Marriage of Park* (1980) 27 Cal.3d 337, 342 [extrinsic fraud is "given a broad meaning and tend[s] to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing"]; *Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1246 [" '[E]xtrinsic mistake exists when the ground of relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense. If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present.' "], quoting *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.) And, as we have pointed out, Smith's motion to vacate to the extent it was based on derelictions of her former attorney was timely, in any event, as to the principle order at issue—the order striking her objection to Farrell's petition for probate, appointment as administrator, and issuance of letters. (See *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248–1249 [discussing when statutory motion to vacate can be based on a lawyer's derelictions as to discovery].)

Farrell points out that Probate Code section 8007 provides that "an order admitting a will to probate or appointing a personal representative, when it becomes final, is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked," except on a showing of "extrinsic fraud in the procurement of the court order" or that the order "is based on the erroneous determination of the decedent's death." (Prob. Code, § 8007, subds. (a), (b)(1), (2).) We first observe this provision expressly allows for challenge based on extrinsic fraud.

In addition, contrary to Farrell's assertion that section 8007 precludes *any* subsequent challenge to an unappealed order admitting a will to probate or appointing a personal representative, the reach of Probate Code section 8007 is more limited. As the statute states on its face, an unchallenged order admitting a will to probate or appointing a personal representative is conclusive as to the probate court's jurisdictional determinations. (See *Estate of Buckley* (1982) 132 Cal.App.3d 434, 444–446 (*Buckley*) [holding probate court could vacate order appointing personal representative and issuing

letters where no compliance with statutory notice requirements].) Thus, the consequence of this provision is that even if a determination of " 'residence,' " for example, turns out to have been incorrect, once the order becomes final by lapse of the time to appeal, " 'it cannot be collaterally attacked.' " (*Id.* at p. 445, citing 7 Witkin, Summary of Calif. Law (8th ed. 1974) Wills and Probate, § 240, pp. 5746–5747.) And, in that context, a motion to vacate filed after the time to appeal has run, is a "collateral" attack on the order. (*Buckley*, at p. 446, fn. 2.)

Smith's motion to vacate, however, did not challenge any "jurisdictional fact" necessary to commence the instant probate proceeding—that is, Smith did not contest that Goodwin had died, or that she was a California resident, or that she left property in California. (See *Buckley, supra*, 132 Cal.App.3d at pp. 444–446.) Accordingly, Probate Code section 8007 posed no procedural (or, to use Farrell's terminology, "jurisdictional") impediment to the probate court's granting of Smith's motion to vacate. (Prob. Code, § 800[5]; see also *Estate of Beard, supra*, 71 Cal.App.4th at p. 774 [as a court of general jurisdiction, probate court had power "to set aside any of its prior orders, even though final, on the ground of extrinsic fraud or mistake"].) We also note that by vacating its prior order striking Smith's objection and granting Farrell's petition for probate and appointment as administrator, the probate court did nothing more than insure that the appropriate manner of handling Goodwin's estate—either as an intestate matter or through the probate of a will—will be decided on the merits. In other words, Farrell's view that the estate should pass by way of the laws of succession may still prevail if the

[5] Probate Code section 800 was enacted to make clear that probate courts are courts of general jurisdiction having the same powers that are invested in the superior courts to resolve the matters that are properly before them. (See Code Civ. Proc., § 128 [enumerating "Powers . . . of Courts"]; see e.g., *Estate of Kraus* (2010) 184 Cal.App.4th 103, 113–114 [probate court had jurisdiction to order misappropriated funds and statutory penalties placed in estate for future distribution; even apart from statutory authority, probate court is a court of general jurisdiction with broad equitable powers]; *Estate of Beard*, *supra*, 71 Cal.App.4th at pp. 773–774]; see generally Ross & Cohen, Cal. Practice Guide: Probate (The Rutter Group 2017) ¶¶ 3:60.6, 3:60.16, pp. 3-22 to 3-25.)

court finds that the trust and will proffered by Smith were obtained through fraud or undue influence.[6]

As we have recited, in his opening brief, Farrell made only a legal challenge to the probate court's order—that the court lacked authority to entertain Smith's motion to vacate because Smith did not appeal the order striking her objection and granting Farrell's petition for probate and appointment as administrator. Farrell therefore made no separate substantive challenge to the court's order. In passing in his opening brief, he observed that the probate court found relief was warranted as a matter of " 'fundamental fairness,' " implying this did not qualify as a finding of "extrinsic fraud or mistake." However, he did not provide any amplifying discussion or citations. Farrell therefore waived any challenge to the substance of the court's order granting Smith's motion to vacate. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [" ' "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." ' "].)

Indeed, in his reply brief, Farrell reiterated his assertion that the probate court "lacked the power to set aside a final and conclusive order" under either Code of Civil Procedure section 473 or its inherent equitable powers. He thus chided Smith for seeking "to look behind" the order granting her motion to vacate and for urging, in her respondent's brief, that the order striking her objections to Farrell's petitions for probate and appointment as administrator was the equivalent of a "default judgment" that could be vacated on the ground Strain effectively abandoned Smith, thus depriving her of the

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[6] In his opening brief, Farrell also asserted Probate Code section 8226 precluded the probate court from granting any effective relief to Smith. That statute provides, among other things, that the proponent of a will may petition for admission of that will into probate within the *later* of 120 days "after issuance of the order admitting the first will to probate or determining the decedent to be intestate" or 60 days "after the proponent of the will first obtains knowledge of the will." (Prob. Code, § 8226, subd. (c)(1), (2).) Given that we have rejected Farrell's assertion that the probate court had no power to vacate its order granting Farrell's petition for probate and appointment as administrator, the 120-day period set forth in Probate Code section 8226, subd. (c)(1) has not yet run, and therefore this statute is no impediment to the relief granted Smith.

ability to put on her case. Farrell accordingly re-characterized Smith's argument as asserting that a probate court "possesses equitable powers to rescind and set aside a final and conclusive order as it sees fit under the circumstances." In doing so, Farrell again emphasized the "legal" character of his attack on the order granting Smith's motion to vacate.

Nevertheless, at a subsequent point in his reply brief, Farrell asserted that *if* this court were to "find that the trial court had authority" to grant Smith's motion to vacate, we should then "apply an abuse of discretion standard" and reverse if Smith failed to provide "proper grounds and applicable facts" to support vacating the orders. Courts of Appeal ordinarily will not consider arguments raised for the first time in an appellant's reply brief, and we decline to do so here. (See *Hudson v. Superior Court* (2017) 7 Cal.App.5th 999, 1016 [" ' "points raised for the first time in a reply brief will not be considered unless good reason is shown for failure to present them earlier" ' "].)

DISPOSITION

The order of the probate court is affirmed. Respondent to recover costs on appeal.

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Banke, J.

We concur:

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Margulies, Acting P.J.

_____
Kelly, J.*

*Judge of the Superior Court of California, County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A152146, *Farrell v. Smith*